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5 Attorneys for USACM Liquidating Trust

6 **UNITED STATES BANKRUPTCY COURT**  
 7 **DISTRICT OF NEVADA**

8 In re:

9 **USA COMMERCIAL MORTGAGE**  
 10 **COMPANY,**

11 **USA CAPITAL REALTY ADVISORS,**  
 12 **LLC,**

13 **USA CAPITAL DIVERSIFIED TRUST**  
 14 **DEED FUND, LLC,**

15 **USA CAPITAL FIRST TRUST DEED**  
 16 **FUND, LLC,<sup>2</sup>**

17 **USA SECURITIES, LLC,<sup>3</sup>** Debtors.

**Affects:**

- All Debtors
- USA Commercial Mortgage Company
- USA Capital Realty Advisors, LLC
- USA Capital Diversified Trust Deed Fund, LLC
- USA Capital First Trust Deed Fund, LLC
- USA Securities, LLC

Case No. BK-S-06-10725-LBR<sup>1</sup>  
 Case No. BK-S-06-10726-LBR<sup>1</sup>  
 Case No. BK-S-06-10727-LBR<sup>2</sup>  
 Case No. BK-S-06-10728-LBR<sup>2</sup>  
 Case No. BK-S-06-10729-LBR<sup>3</sup>

**CHAPTER 11**

Jointly Administered Under Case No.  
 BK-S-06-10725 LBR

**Objection of USACM Trust to Proof of  
 Claim of Florence Bolatin Living Trust  
 DTD 10/23/98 As Filed Partially in  
 Wrong Debtor's Case; Objection of  
 DTDF to Proposed Allowance of Claim  
 (with Certificate of Service)**

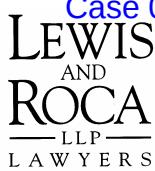
Date of Hearing: April 30, 2009  
 Time of Hearing: 9:30 a.m.

21 Florence Bolatin Living Trust DTD 10/23/98 ("Bolatin") filed Proof of Claim No.  
 22 10725-01156 against USA Commercial Mortgage Company ("USACM") in the amount of  
 23 \$110,712.00 (the "Claim"). The USACM Liquidating Trust (the "USACM Trust") objects  
 24 to the allowance of \$50,000 of the Claim because it is based upon an investment in USA

25 <sup>1</sup> This bankruptcy case was closed on September 23, 2008.

26 <sup>2</sup> This bankruptcy case was closed on October 12, 2007.

<sup>3</sup> This bankruptcy case was closed on December 21, 2007.



1 Capital Diversified Trust Deed Fund (“DTDF”) and was therefore filed in the wrong  
 2 debtor case.

3 DTDF further objects to any allowance of the Claim against the DTDF Estate.  
 4 DTDF has determined that Bolatin has an allowed proof of interest in the DTDF case for  
 5 \$48,047.32. This objection does not prejudice Bolatin’s rights as a DTDF member to  
 6 recover from the DTDF estate on a pro rata basis for Bolatin’s membership interest.

7 This objection is made pursuant to § 502 of title 11 of the United States Bankruptcy  
 8 Code (the “Bankruptcy Code”) and Rule 3007 of the Federal Rules of Bankruptcy  
 9 Procedure (the “Bankruptcy Rules”).

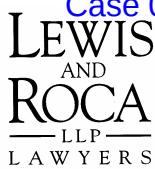
## 10 **I. JURISDICTION**

11 The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and  
 12 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core  
 13 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007. The statutory predicate  
 14 for the relief requested herein are 11 U.S.C. § 502 and Bankruptcy Rule 3007.

## 15 **II. BACKGROUND**

16 1. On April 13, 2006 (“Petition Date”), USACM, USA Securities, LLC (“USA  
 17 Securities”), USA Capital Realty Advisors, LLC (“USA Realty”), USA Capital  
 18 Diversified Trust Deed Fund, LLC (“DTDF”), USA Capital First Trust Deed Fund, LLC  
 19 (“FTDF,” together with DTDF, the “Funds”) (collectively, “Debtors”), filed voluntary  
 20 petitions for relief under chapter 11 of the Bankruptcy Code. Debtors continued to operate  
 21 their businesses, if any, as debtors-in-possession pursuant to sections 1107(a) and 1108 of  
 22 the Bankruptcy Code. Debtors’ post-petition management of the Debtors was under the  
 23 direction of Thomas J. Allison of Mesirow Financial Interim Management, LLC  
 24 (“Mesirow”), who served as the Chief Restructuring Officer.

25 2. USACM is a Nevada corporation that, prior to the Petition Date, was in the  
 26 business of underwriting, originating, brokering, funding and servicing commercial loans  
 primarily secured by real estate, both on behalf of investors and for its own account.



1       3.     On September 14, 2006, the Court entered its Order Setting Deadline to File  
2 Proofs of Claim and Proofs of Interest (the "Bar Date Order") [Docket No. 1280]. The  
3 Bar Date Order established 5:00 p.m., prevailing Pacific Time, on November 13, 2006, as  
4 the deadline ("Bar Date") for creditors to file Proofs of claim.

5       4.     On September 25, 2006, the Debtors served a copy of the Bar Date Order on  
6 their service lists [Docket No. 1358]. All Direct Lenders were served with a copy of the  
7 Bar Date order as well [Docket No. 1358].

8       5.     On November 6, 2006, a stipulation was filed and an order entered extending  
9 the Bar Date for Direct Lenders only to file Proofs of Claim until January 13, 2007  
[Docket No. 1729].

10      6.     On January 8, 2007, this Court entered its Order Confirming the "Debtors'  
11 Third Amended Joint Chapter 11 Plan of Reorganization" [Docket No. 2376].

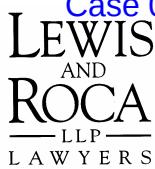
12      7.     Debtors' Third Amended Chapter 11 Plan of Reorganization (the "Plan")  
13 [Docket No. 1799] provides the following deadlines for objections to Claims:

14       a.     for any and all Claims and Equity Interests to which the  
15 General Bar Date applies, ninety (90) days after the Effective Date; (B) for  
16 any and all Claims to which the Administrative Claims Bar Date or the  
17 Professionals Administrative Bar Date applies, thirty (30) days after the  
18 expiration of the respective Bar Date; and (C) for any and all Claims to  
19 which the Bar Date applicable under section B.3 of Art. V of the Plan  
20 applies, thirty (30) days after the expiration of that Bar Date.

21      8.     USACM's claims and noticing agent received approximately 2,436 Proofs of  
22 Claim as of the January 13, 2007 Bar Date, asserting claims totaling more than  
23 \$997,000,000, plus unknown amounts based on unliquidated Claims.

24      9.     Under the Plan, the USACM Trust is the successor to USACM with respect  
25 to standing to seek allowance and disallowance of Claims.

26      10.    The USACM Trust exists as of the Effective Date of the Plan, which was  
March 12, 2007. Geoffrey L. Berman is the Trustee.



## 1       II. APPLICABLE AUTHORITY

2       1. Under the Bankruptcy Code, any Claim for which a Proof of Claim has been  
 3       filed will be allowed unless a party in interest objects. If a party in interest objects to the  
 4       Proof of Claim, the Court, after notice and hearing, shall determine the amount of the  
 5       Claim and shall allow the Claim except to the extent that the Claim is “unenforceable  
 6       against the debtor . . . under any . . . applicable law for a reason other than because such  
 7       claim is contingent or unmatured.” 11 U.S.C. § 502(b).

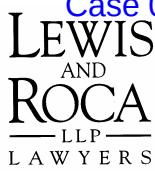
8       2. The USACM Trust is entitled to object to Proofs of Claim under 11 U.S.C.  
 9       § 502(a). This objection is timely under the confirmed Plan, as the deadline for such  
 10      objections has been extended to June 10, 2009, by this Court’s orders.

11      3. A properly filed Proof of Claim is presumed valid under Bankruptcy Rule  
 12      3001(f). However, once an objection to the Proof of Claim controverts the presumption,  
 13      the creditor ultimately bears the burden of persuasion as to the validity and amount of the  
 14      claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*,  
 15      178 B.R. 222, 226 (B.A.P. 9th Cir. 1995), *aff’d*, 91 F.3d 151 (9th Cir. 1996). The ultimate  
 16      burden of proof as to the validity of a proof of claim “remains at all times upon the  
 17      claimant.” *Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035,  
 18      1039 (9th Cir. 2000).

## 19       III. OBJECTION TO CLAIM

20      1. USACM Trust objects to the allowance of \$50,000 of the Claim because it is  
 21      based upon an investment in DTDF and was therefore incorrectly filed in the USACM  
 22      case. This is demonstrated by the attachments to the Proof of Claim.

23      2. The USACM Liquidating Trust (“USACM Trust”), as successor to USACM  
 24      entered into a settlement with USA Capital Diversified Trust Deed Fund, LLC. On April  
 25      1, 2008, the Order Granting Motion to Approve Settlement Agreement with USA Capital  
 26      Diversified Trust Deed Fund, LLC [DE 6091] was signed by this Court. Because DTDF



1 was granted a \$128 million unsecured claim in the USACM Estate, any claim held by  
 2 Bolatin against USACM solely on account of the investment in DTDF is derivative of  
 3 DTDF's claims against USACM, and Bolatin may not prosecute such claims on Bolatin's  
 4 own behalf.

5       3.     In *In re Van Dresser Corp.*, plaintiff was a shareholder of Van Dresser,  
 6 which owned two subsidiaries.<sup>4</sup> The president of Van Dresser looted the subsidiaries,  
 7 ultimately forcing them and Van Dresser into bankruptcy. The plaintiff had guaranteed  
 8 \$1.125 million in loans to the debtor, and had to repay them when debtor defaulted.  
 9 Plaintiff then sued the debtor's principal, and two other defendants (who he alleged aided  
 10 and abetted the corporate looting) for various torts, including conversion, breach of  
 11 fiduciary duty, and civil conspiracy.

12       4.     The court stated that a debtor's trustee has the exclusive right to assert a  
 13 debtor's claims, and that a claim belongs solely to the debtor's estate if the debtor could  
 14 have raised the claim at the commencement of the bankruptcy case.<sup>5</sup> Additionally, if a  
 15 judgment against a defendant by either the debtor or another party asserting the debtor's  
 16 claim precludes the other from recovery, then the claims are not independent of each other  
 17 and belong exclusively to the debtor.<sup>6</sup>

18       5.     Thus, because both the plaintiff and the debtor corporation could state claims  
 19 for damages against the defendants, but only one could recover on those claims, by default  
 20 the claims were exclusively property of the Van Dresser trustees.<sup>7</sup> In order for a plaintiff  
 21

22       

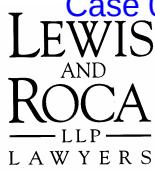
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<sup>4</sup> *In re Van Dresser Corp.*, 128 F.3d 945 (6<sup>th</sup> Cir. 1997).

23       <sup>5</sup> *Id.* at 947 (citing *In re Educators Group Health Trust*, 25 F.3d 1281, 1284 (5<sup>th</sup> Cir.  
 24 1994); see also *In re Real Marketing Services, LLC*, 309 B.R. 783 (S.D. Cal. 2004) (citing  
 25 *Van Dresser* with approval in a case involving an LLC debtor).

26       <sup>6</sup> *Id.*

7 *Id.* at 948.



1 to bring a claim, either the trustee must have truly abandoned the claim, or the plaintiff  
 2 must be able to allege a distinct and specific injury.<sup>8</sup>

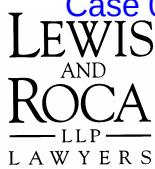
3       6.     Similarly, in *In re Real Marketing*, the debtor had attempted to enter into an  
 4 asset purchase agreement that specifically included the assumption of debt owed to the  
 5 debtor's managing member. The agreement fell through, and after the managing member  
 6 filed an involuntary petition for relief against the debtor, the managing member asserted  
 7 various causes of action against the purchasing company, including contract claims, debt  
 8 assumption claims, misrepresentation claims, and interference claims.<sup>9</sup> The court,  
 9 however, found that all of the claims involved both the debtor's managing member and the  
 10 debtor itself, and thus the right to pursue all of the causes of action resided with the  
 11 trustee.<sup>10</sup>

12       7.     DTDF further objects to any allowance of Bolatin's claim as a claim against  
 13 the DTDF Estate. DTDF has determined that Bolatin has an allowed proof of interest in  
 14 the DTDF case in the amount of \$48,047.32. This objection does not seek to prejudice the  
 15 rights of Bolatin as a DTDF member to recover from the DTDF estate on a pro rata basis  
 16 on account of Bolatin's membership interest in the amount of \$48,047.32. Bolatin shall  
 17 retain an interest in DTDF in the amount of \$48,047.32, as reflected in the books and  
 18 records of DTDF, and Bolatin is entitled to receive distributions on a pro rata basis with all  
 19 other DTDF members.

20  
 21  
 22       8 *Id.* at 949 (for example, a claim for the attorneys' fees plaintiff incurred defending the  
 23 suits on the guaranty).

24       9 *In re Real Marketing*, 309 B.R. 783, 786-87 (S.D. Cal. 2004).

25       10 See also *In re Ionosphere Clubs, Inc.*, 156 B.R. 414 (S.D.N.Y. 1993) (courts determine  
 26 whether action is individual or derivative based on state law, and the preferred  
 shareholders breach of fiduciary duty claims were derivative per Delaware law); *In re Van  
 Dresser*, 128 F.3d at 947 ("whether a creditor has sole right to a cause of action is  
 determined in accordance with state law").



1                   **V. CONCLUSION**

2                   Accordingly, the USACM Trust and DTDF, pursuant to Bankruptcy Code section  
 3 502, Federal Rule of Bankruptcy Procedure 3007, and Local Rule of Bankruptcy Practice  
 4 3007, seek entry of an order that will disallow \$50,000 of Bolatin's claim against  
 5 USACM, disallow any proposed allowance of Bolatin's claim in the DTDF case, and  
 6 appropriately allow Bolatin to retain an equity interest in DTDF in the amount of  
 7 \$48,047.32 as reflected in the books and records of DTDF as of April 13, 2006. USACM  
 8 Trust reserves the right to object to the remaining balance of the claim at a later date.

9                   DATED: March 25, 2009.

10                   LEWIS AND ROCA LLP

11                   By /s/ John Hinderaker (#18024)  
 12                   Rob Charles, NV 6593  
 13                   John C. Hinderaker, AZ 18024 (*pro hac vice*)  
 14                   3993 Howard Hughes Parkway, Suite 600  
 15                   Las Vegas, Nevada 89169  
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 18                   E-mail: rcharles@lrlaw.com  
 19                   *Attorneys for the USACM Liquidating Trust*

20                   PROOF OF SERVICE

21                   Copy of the foregoing mailed by First  
 22                   Class, U.S. Mail, postage prepaid, on  
 23                   March 25, 2009 to the following party:

24                   Florence Bolatin Living Trust DTD 10/28/93  
 25                   c/o Florence Bolatin, Trustee  
 26                   2105 Diamond Brook Ct  
 27                   Las Vegas, NV 89117-1866

28                   /s/ Carrie Lawrence  
 29                   Carrie Lawrence